89-1868

No. 90 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Third Circuit err by affirming the judgment of district court which held that a shipowner had a duty to intervene in the cargo operations of an independent stevedoring contractor and take measures to prevent the possibility of harm to longshoremen arising from a condition on board the vessel, when the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen, or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners

Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Oulo O/Y and OY Finnlines, Ltd.[1], respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 29, 1990, rehearing denied on February 27, 1990, which affirmed, without opinion, the judgment of the United States District Court for the Eastern District of Pennsylvania that a shipowner had a duty to intervene in the cargo operations of an independent stevedoring contractor and take measures to prevent the possibility of harm to longshoremen arising from a condition on board the

1. Oulo O/Y and OY Finnlines, Ltd. are foreign corporations which are not publicly traded.

vessel, when the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen, or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner, and in support thereof represent as follows:

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not officially reported and is reproduced in the Appendix hereto. (1a). The judgment of the United States Court of Appeals for the Third Circuit affirming the lower court decision, without opinion, is not officially reported and is reproduced in the Appendix hereto. (14a). The judgment of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing is also reproduced in the Appendix hereto. (16a).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 29, 1990. The Petition for Rehearing was denied on February 20, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Longshore and Harbor Worker's Compensation Act, Section 5(b), 33 U.S.C. Section 905 (b)

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title,

and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The Legislative History of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, as set forth in House Report No. 92-1441, is reprinted in 1972 U.S. Cong. & Adm. News, Vol. 3, at 4698.

STATEMENT OF THE CASE

This lawsuit was originated by longshoreman, John Callen, to recover damages for personal injuries sustained on December 30, 1986, while working aboard the M/V POKKINEN, which was docked in the Port of Philadelphia. The jurisdiction of the district court was based upon 28 U.S.C. 1332, due to the diversity of

citizenship between the parties, and 28 U.S.C. Section 1331, as an action arising under the laws of the United States, namely, Section 5(b) of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C., Section 905(b).

Defendants, OULO O/Y and O/Y FINNLINES, owned and operated the M/V POKKINEN, an ocean-going cargo vessel. In December, 1986, the POKKINEN called at the Port of Philadelphia carrying a cargo of rolls of newsprint. The rolls of newsprint had been loaded aboard the POKKINEN by independent stevedoring contractors in Finland. As they had done on numerous prior occasions when their ships had called at the Port of Philadelphia, defendants hired Independent Pier Company, an independent stevedoring contractor, to discharge the newsprint from the vessel.

Plaintiff, John Callen, was a longshoreman employed by Independent Pier Company. Plaintiff Callen was injured while discharging the newsprint from the No. 3 cargo hold. The No. 3 cargo hold consisted of a 'tween deck (middle deck), and a lower hold. (2a). The hatch covers in the 'tween deck opened up in accordion-like fashion to permit access to the lower hold. (2a). In order to provide a means of ingress and egress for the longshoremen to climb into the lower hold when the 'tween deck hatch covers were opened, the manufacturer of the vessel designed and built a ladder into the surface of the 'tween deck hatch lids. The "ladder" was about 16 inches wide, with "rungs" that were 3 inches wide and 4 inches deep. When the 'tween deck hatch lids were closed, the "rungs" of the ladder were notches on the floor of the 'tween deck; when the hatch covers were opened, the notches became the "rungs" of a vertical ladder, permitting access to the lower hold. (2a).

The rolls of newsprint had been loaded in the 'tween deck by independent foreign stevedores in the customary manner; the rolls had been stowed on top of brown cardboard-like paper to protect the cargo from moisture,

oil, grease, etc., that may have accumulated on the 'tween deck. (3a).

On December 30, 1986, the POKKINEN docked at Pier 80, Philadelphia, and Independent Pier Company began discharging the cargo from the vessel at 8:00 a.m. Independent Pier Company employed several groups or gangs of longshoremen, including a gang headed by Joseph Micofsky. Micofsky's gang was assigned to discharge rolls of newsprint from the 'tween deck, No. 3 hatch. On this particular day, Micofsky was missing one of his regular gang members, so he hired plaintiff John Callen as a "pick-up", or temporary replacements to work in his gang. (2a).

As the longshoremen in Micofsky's gang discharged the rolls of newsprint from the 'tween deck, they picked up the brown cardboard-like paper that the rolls had been stowed on, thereby exposing portions of the 'tween deck. At approximately 10:30 a.m., plaintiff Callen and his co-workers were attempting to attach a piece of equipment, known as a cage, to several rolls of newsprint in order to discharge the rolls from the 'tween deck. (4a). Callen allegedly stepped backward with his right foot into one of the notches which formed the rungs of the ladder recessed into the 'tween deck hatch covers, injuring his ankle. (4a).

Callen testified that he was not aware of the "rungs" in the 'tween deck because they were covered with the brown paper. (3a). Callen also testified that before he started to work that day, he did not receive any warnings from the stevedore, its supervisors, or his gang boss about the presence of the ladder in the 'tween deck. (3a, 17a).

The POKKINEN and her sister ships, the VARJAKKA, FINN ARCTIS, and FINN FIGHTER, had all been serviced by Independent Pier Company, for a 10 to 15 year period prior to this accident. (19a). During that time, Independent Pier Company had become familiar with the design of these vessels, and the customary

manner in which rolls of newsprint were stowed. (18a-22a). Furthermore, the stevedore's foreman or "gang boss", Joseph Micofsky, admitted that during his ten years with Independent Pier Company, he had worked on board the POKKINEN and her sister ships, and had become very familiar with the design of the vessels, including the presence of the ladder in the 'tween deck covers. (20a). Micofsky also admitted that he was familiar with the customary manner of stowing the rolls of newsprint, including the custom of covering the recessed ladder with brown paper, (22a) and he warned his regular gang members of the presence of the rungs or notches of the ladder. (20a, 22a). However, Micofsky failed to give any warnings to plaintiff Callen, the temporary employee, because Micofsky assumed the regular members in the gang would convey the warning to Callen. (23a).

The defendants were unaware of the stevedore's malfeasance. The ship's crew did *not* know that Callen was a pick-up, and did *not* know he had not been warned of the "rungs" by his employer or supervisors. Defendants had never received any reports of prior accidents or complaints regarding the ladder in the 'tween deck. (24a-25a).

Following a non-jury trial, the district court issued its opinion, setting forth its Findings of Fact and Conclusions of Law. The district court found the vessel owner negligent, which negligence caused plaintiff's injuries. The court reasoned that the defendant shipowner had a duty to intervene and to take measures to prevent the possibility of harm to longshoremen arising from a condition on board the vessel, even though the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner. The district

court awarded damages in the sum of $226,508.00, with interest, and judgment was entered on April 7, 1989. (13a).

Defendants filed a timely appeal; argument was held on November 16, 1989. On January 29, 1990, the United States Court of Appeals for the Third Circuit entered a judgment, without opinion, which denied the appeal and affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania in all respects. (14a). Defendant filed a timely Petition for Rehearing which was denied on February 27, 1990, with one judge in favor of rehearing. (16a).

REASONS WHY THE WRIT FOR CERTIORI SHOULD BE GRANTED

1. THE DECISION BELOW WHICH HELD THAT A SHIPOWNER CAN BE HELD LIABLE FOR FAILING TO WARN AN INDIVIDUAL LONGSHOREMAN ABOUT A DANGEROUS CONDITION KNOWN TO THE STEVEDORE-EMPLOYER IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN BJARANSON v. BOTELHO SHIPPING CORP., 1989 A.M.C. 381 (9th Cir. 1988), AND THIS COURT'S OPINION IN SCINDIA STEAM NAVIGATION LTD. v. DeLOS SANTOS, 451 U.S. 156 (1981).

Longshoreman Callen's action against defendants OULU O/Y and O/Y FINNLINES, LTD. is governed by Section 5(b) of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b), (hereinafter the Act), and the concept of negligence that has evolved under judicial interpretation of Section 5(b). *See e.g. Scindia Steam Navigation Ltd. v. De Los Santos,* 451 U.S. 156 (1981).

The history and purpose of the 1972 Amendments was detailed by this Court in *Scindia,* 451 U.S. at 165-167. Briefly summarized, the Act was intended to eliminate the shipowner's previous faultless liability to

longshoremen based on theories of unseaworthiness or a non-delegable duty to provide a safe place to work. *Id.* at 166; *see also Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490 (3d Cir. 1987); *Rich v. U.S. Lines,* 596 F.2d 541 (3d Cir. 1978); *Hurst v. Triad Shipping Co.,* 544 F.2d 1237 (3d Cir. 1977).

Although Section 5(b) of the 1972 Amendments provided that the shipowner could only be held liable for its own negligence, Section 5(b) did not specify the acts or omissions of the shipowner that would constitute negligence. In *Scindia,* 451 U.S. 156 (1981), therefore, this Court addressed the issue of defining the standard of care which a shipowner owes to a longshoreman.

Scindia involved a suit by a longshoreman who alleged that he was injured as a result of the malfunctioning of the braking mechanism of a ship's crane. After reviewing the history and purpose of the 1972 Amendments, this Court concluded: (1) the shipowner could not be held liable for the negligence of an independent contractor such as a stevedore over which it exercises no operational control, *Id.* at 173; and (2) that prior to the start of work the shipowner owed a duty of reasonable care to longshoremen with regard to those physical parts of the vessel and its equipment over which the ship had operational control.

The Court specifically defined the shipowner's duty prior to the start of longshore operations as follows:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by

> the stevedore in the course of his cargo operations and *that are not known by the stevedore* and would not be obvious to or anticipated by him if reasonably competent in the performance of his work . . . .

Scindia, 451 U.S. at 166-167 (1981) (emphasis added).

It is undisputed in the present case that the stevedore, gang boss Micofsky, and plaintiff's fellow longshoremen were aware of the ladder rungs prior to the accident. This knowledge was gained from previous warnings by the shipowner and by their substantial prior experience on board the POKKINEN and her sister ships which had similar designs.

Over a 10-15 year period, the warnings provided by the shipowner to the stevedore had proven sufficient to permit experienced longshoremen to perform their duties safely, and the shipowner had no reason to believe anything further was necessary on December 30, 1986. In fact, the lower court found that the shipowner met this "primary" or "initial" duty by providing an appropriate warning of this condition. The lower court stated in the "Discussion" portion of its Opinion, "[i]t had warned the stevedoring company previously about the situation. Normally this would be sufficient to preclude liability on its part". (7a)

Unfortunately, the stevedore and plaintiff's co-workers did not impart that warning to plaintiff Callen, a temporary-replacement employee, which led to plaintiff's accident. Although the lower court concluded that the shipowner's warning to the stevedore was proper and adequate, the lower court imposed liability on the defendants because of the stevedore's negligence in failing to relay that warning to all of its employees, and because of the defendants' failure to supervise the manner in which the stevedore carried out its cargo operation. The court specifically stated that, "[g]ranted that this defect had been disclosed by the vessel to the

stevedore. This warning, however, had been made at some indefinite time in the past and had been made to the stevedore and not to the longshoremen." (9a).

This holding is in direct conflict with the Ninth Circuit Court of Appeal's decision in *Bjaranson v. Botelho Shipping Corp.*, 1989 A.M.C. 381 (9th Cir. 1988). In that case, the plaintiff was injured while trying to descend a "coaming ladder" along the side of the No.2 hatch. Apparently there was no handhold for the ladder and the ladder terminated two or three feet below the top of the hatch. Plaintiff claimed that the defendant vessel owner "was negligent in failing to provide a coaming ladder with a handhold or handrails, and in failing to provide a safe means of access to the No. 1 hatch." *Id.* at 383. A jury determined that the vessel was negligent. On appeal, the Court of Appeals determined that there was insufficient evidence to support a finding that the defendant vessel owner breached any of the limited duties set forth in §905(b) of the Longshore and Harbor Worker's Compensation Act. The court held that the vessel owner could not be found to have breached the duty to warn since the stevedoring contractor was aware of the condition. The court specifically held that a vessel owner does not have a duty to warn individual longshoremen about dangerous conditions. The court said:

> The condition of the ladder was apparent and obvious when Bjaranson's employer, the stevedoring contractor, boarded the ship and assumed the control of the cargo operation. Although the condition may not have been obvious to Bjaranson at night, the fact that the condition was obvious to his employer eliminated whatever duty there may have been upon Botelho to warn the individual employees. See, generally, *Gulf Oil Corp. v. Bivins,* 276 F.2d 753, 758 (5 Cir.) (applying Restatement of Torts sec. 343 (1934)), cert. denied, 364 U.S. 906 (1960).

> Indeed, to conclude otherwise would result in the "creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen [that] would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Hurst v. Triad Shipping Co.,* 1977 AMC 1625, 1643, 554 F.2d 1237, 1250 n.35 (3 Cir.), cert. denied, 434 U.S. 861, 1978 AMC 1896 (1977); see also *Scindia,* 451 U.S. at 169-70, 1981 AMC at 612 (describing "the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship").

Id. at 388 n.7.

The decision of the district court in the present case, which was affirmed by the Third Circuit Court of Appeals, is in direct conflict with the decision in *Bjaranson,* which petitioners assert is the proper interpretation of a vessel owner's duties under the Longshore and Harbor Worker's Compensation Act. If the decision in this case is not reversed, a vessel owner would be required to interview each of the stevedore's employees-longshoremen to ascertain whether their supervisors had imparted to them all instructions and warnings necessary for them to safely conduct their work; reimposing on the vessel owner a duty to supervise the work of the stevedore and its longshoremen, a result contrary to the purpose and intent of the Longshore and Harbor Worker's Compensation Act, as well as the holding of this court in *Scindia.*

It is well recognized that the shipowner can rely upon the stevedore to avoid exposing the longshoremen to hazards. "Section 41 of the Act, 33 U.S.C. Section 941, requires the stevedore, the longshoremen's employer, to provide a 'reasonably safe' place to work and to take such safeguards with respect to equipment and working conditions as . . . may . . . be necessary to avoid

injury to longshoremen." *Scindia,* 451 U.S. 156, 170. *Scindia* also established that the shipowner has no general duty to supervise or inspect the cargo operations and "is entitled to rely on the stevedore, to guard against hazards to its employees. . . ." 451 U.S. 156, 174; *Derr,* 835 F.2d 490, 493.

As correctly noted in the lower court's opinion in the present case, a shipowner may be required under certain limited circumstances during the course of the stevedore's operation to intervene to correct or remedy a dangerous condition. According to this Court's decision in *Scindia,* if the judgment of the stevedore to proceed with the cargo operation despite the hazard is "so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to [work], should have realized [the condition] presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and [remedy the condition]." *Scindia,* 451 U.S. 156, 175-176. Thus, the duty to intervene applies only to those limited situations when: (1) the stevedore is proceeding in an obviously improvident manner; and (2) the shipowner knew that the stevedore was proceeding in such an obviously improvident manner.

In the instant case, although the stevedore admittedly exercised bad judgment, there was no evidence that the defendants had actual knowledge of the stevedore's bad judgment. The stevedore had discharged the same cargo from the POKKINEN and her sister ships in a similar manner without incident for the past 10-15 years. Unless the shipowner was required to supervise the work of the longshoremen, contrary to the expressed purpose of the 1972 Amendments and the holding of this Court in *Scindia,* the shipowner would not have known that the stevedore failed to impart the warning about the ladder to one of its temporary employees.

Accordingly, unless the shipowner is going to be placed in the position of supervising the work of the

longshoremen, there is no basis in the law to impute the "poor judgment" of the stevedore to the shipowner. Imposing liability upon the vessel owners based upon the stevedore's "poor judgment" is contrary to the Longshore and Harbor Worker's Compensation Act, which specifically places the primary responsibility for the safety of the longshoremen on the stevedore.

In defining the shipowner's duty of care, this Court cited the decision of the Third Circuit Court of Appeals in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir. 1977), which held that placing responsibility on the shipowner for the conduct of the stevedore would be contrary to the purpose of the 1972 Amendments:

> [C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of non-delegable duty that Congress sought to eliminate by amending Section 905(b).

Scindia, 451 U.S. at 169.

The lower court's opinion also seeks to reimpose a general duty on the shipowner to supervise the work of the longshoremen, and intervene whenever the stevedore makes a decision which could subsequently be considered "poor judgment." Again, this is precisely the type of duty and responsibility which the 1972 Amendments sought to eliminate. Accordingly, the decision of the district court is contrary to the Longshore and Harbor Worker's Compensation Act, and the decisions of this Court in *Scindia.*

CONCLUSION

Prior to the decision of the Third Circuit Court of Appeals which affirmed the holding of the lower court in the instant case, there was already a conflict among the circuits regarding the duty a shipowner owed to longshoremen under the 1972 Amendments. The Third Circuit Court's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1988), *cert. denied,* 108 S.Ct. 1733 (1988), is admittedly in conflict with the Ninth Circuit Court's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied,* 459 U.S. 967 (1982); and the Fifth Circuit Court's decision in *Woods v. Sammissa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1987), *cert. denied,* 110 S.Ct. 853 (1990).[2] The Third Circuit Court's decision in the instant case, which is in conflict with the Ninth Circuit Court's decision in *Bjaranson v. Botelho Shipping Corp.*, 1989 A.M.C. 381 (9th Cir. 1988), only adds to the confusion facing shipowners. One of the specific purposes of enacting the 1972 Amendments was to promote safety on the waterfront by defining the respective duties and responsibilities of shipowners and stevedores. Because of the conflicts in the circuits, shipowners and stevedores are faced with the dilemma of having duties and responsibilities varying from port to port in the United States. This lack of uniformity not only fails to promote safety on the waterfront, but encourages inadequate supervision and control of the longshoremen.

For the foregoing reasons, petitioners respectfuly request This Honorable Court to issue a Writ of Certiorari to review the decision of the Court below and to review the conflict which has developed among the Circuits regarding the duty owed by shipowners to the

---

2. The Chief Justice, Justice White and Justice Kennedy filed a dissent stating that they would grant certiorari in light of the conflict among the circuits regarding a shipowner's duty of care.

employees of independent stevedoring contractors hired to discharge and/or load cargo from their vessels.

Respectfully submitted,

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners,
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

89-1868

No. 90 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN CALLEN	:	CIVIL ACTION
	:	
v.	:	
	:	
OULU O/Y and OY FINNLINES, LTD.	:	NO. 87-7830

ADJUDICATION

VAN ANTWERPEN, J. April 7th, 1989

This non-jury matter is an action by a longshoreman against a shipowner for negligence. A jury trial is precluded because the shipowner is subject to the provisions of the Foreign Sovereign Immunities Act. *See* 28 U.S.C.A. §1330 (West Supp. 1988) and 28 U.S.C.A. §§1602-1611 (West Supp. 1988). From the non-jury trial on March 13, 1989 through March 15, 1989, we make the following findings of fact and conclusions of law, pursuant to Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

1. The plaintiff, John Callen, was born on September 22, 1925, and is presently 63 years of age. He completed the eighth grade and, after working as a busboy and in manufacturing, he served in the U.S. Navy from 1943 to 1946 and was honorably discharged, Since his discharge, he has worked as a longshoreman in Philadelphia, Pennsylvania. When his usual work unloading sugar ended in 1982, he began to report to the Longshoremen's Hiring Center under the Walt Whitman Bridge.

2. The arrangement is such that, as long as a man checks in each day at the hiring center, he is guaranteed a minimum wage which varies from year to year. For October, 1984 to October, 1985, it was $24,000 per year

and from October, 1985 to October, 1988 it was $25,000 per year. There was an increase to $25,500 per year for the 1988-1989 period. To qualify for this a man must be available for work and a longshoreman is docked $144 against his yearly amount for each day he does not check in with the center. By 1984, plaintiff got in a pool gang which meant he would continue to report for work, but would occasionally be sent out to fill in for absent workers or when extra longshoremen were needed.

3. On December 30, 1986, the plaintiff was given a job working on the "Micofsky Gang" at Pier 80. The ship Pokkinen was docked there. The gang was handling rolls of paper and plaintiff was told to work on the No. 3 hatch lid. He entered at about 10:00 a.m. by climbing down steps which were made in the rolls of paper and went to work.

4. The rolls were being taken off as a draft by a device known as a Jensen rig. The rig is a cage which is placed over several rolls of paper and closed by pulling four lanyards shut. Plaintiff was working as a lanyard man.

5. Plaintiff was working on the tween deck in the hold in question. There is a stairway leading from the hold, but there is also a back-up ladder cut in the side of the hold. The ladder has recessed rungs in the form of pockets in the side of the hold. When the lid or hatch cover of the tween deck is folded down, it provides a deck or floor covering the lower hold of the ship. When the lid folds up accordion style, it partially covers the recessed ladder. For this reason, the tween deck lid has a similar recessed ladder built into it.

6. The recessed ladder in the lid has holes which form rungs approximately 40 cm. long by 10 cm. wide by 10 cm. deep. The entire set of holes is also recessed 1 to 1½ cm. from the main lid deck. Before the unloading on the day in question, the gang boss, Joseph Micofsky, inspected the ship and found nothing unsafe in the ship or cargo. Although nothing was said on December 30,

1986, Mr. Micofsky had warned his men about the danger of the holes on prior occasions. On prior occasions, he also noted plates which covered the recessed ladder in the lid. The plaintiff was never warned about the recessed ladder and was unaware of its presence on December 30, 1986.

7. When the vessel was loaded overseas prior to arriving in Philadelphia, the lower hold was filled and the lower hold deck was covered with 30 cm. by 80 cm. sheets of plywood called walking boards. These boards keep the cargo away from the deck and are spaced about 5 cm. apart to provide drainage. Their placement is supervised by ship's personnel.

8. Chief Merchant Marine Officer Raimo J. Valimaki explained that the vessel in question, the Pokkinen, has four sister ships. The Pokkinen carries paper to Philadelphia about five or six times a year, and the four sister ships used to do likewise; when cargo is loaded by the stevedoring company, a representative of the paper mill is present, along with ship's officers.

9. If extra walking boards are on hand, they are put on the tween deck, although none are usually used when rolls of paper are shipped. Instead, heavy cardboard-like paper is put down on the tween deck and lid to protect rolls of paper from the hold deck and moisture and keep them clean.

10. On December 30, 1986, this heavy paper completely covered the recessed ladder in the lid of the tween deck. Although the cargo usually causes some indentations, there was no written warning of any type on the paper of the voids formed by the steps underneath the paper. Nor was the area roped off. The ship's officers observed the unloading but gave no special warning of the location of the recessed ladder in the lid because they assumed, from past experience, that the stevedoring company knew about it. Ship's officers had warned the company about it in the past.

11. Mr. George Mara, a naval architect, reviewed the design of the ladder on the vessel in question. In his opinion, the holes in the lid pose an unsafe condition unless the slots are covered or the area is roped off. He further testified that the overall 1 to 1½ cm. recess of the entire ladder would allow the placement of a plate over the ladder area when the folding hatch cover lid is in the down position. The plate could be held in place with "J" bolts.

12. At about 10:30 a.m., after he had been working for about thirty minutes, plaintiff stepped back to pull his lanyard on the Jensen rig case which was loaded with rolls of paper. As the draft or load was lifted, plaintiff's right foot fell through the paper covering into a void caused by the ladder recessed into the lid. Plaintiff was fearful that the load might fall on him and he pulled his foot out and scrambled from underneath the load.

13. Plaintiff was in pain and after a while made his way off the ship and was driven to St. Agnes Hospital. His foot had swelled up "like a balloon." The hospital took x-rays but found no broken bones. He was sent home with an ace bandage.

14. Plaintiff went to see a Dr. Weiss and was given therapy at St. Agnes Hospital for about six months with an inflatable boot, which was supposed to force fluid out of his ankle. He continued to have problems with pain and periodic swelling.

15. Plaintiff had a previous injury to the same foot in 1973 when he fell at work on a snow-covered fire hose. He was treated by a Dr. Berman and ultimately had a sympathectomy surgical procedure. This was done to control pain and swelling. After being out for 2½ years, he returned to work. A sympathectomy can cause circulation problems.

16. Plaintiff next went to see another physician named Leonard Klinghoffer, M.D. Dr. Klinghoffer is an orthopedic surgeon and is board certified in his specialty. He first saw plaintiff on May 13, 1987 and

examined him. He found no circulation problems or similar difficulties due to the sympathectomy. Tender areas were found on parts of the ankle. His diagnosis was a sprain of the right ankle complicated by prior circulation problems to an extent which rendered plaintiff disabled.

17. Dr. Klinghoffer gave plaintiff therapy with a board on his foot. This provided a reduction in calf swelling and some relief, but plaintiff remains unable to do regular longshoremen's type work. He cannot put sufficient weight on his foot to climb high ladders and has pain when he squats. Plaintiff is presently able to do only light duty work.

18. As summed up in the physical capabilities check list (Exhibits D-1 and D-2), plaintiff can only stand four to six hours in an eight-hour day, and can squat or climb ladders only occasionally. He can sit eight hours a day, drive three to five hours a day, and walk only one to three hours per day. Plaintiff has no difficulty in using his hands.

19. Mr. Robert Wolf, who has experience and training in rehabilitation and actuarial science, has evaluated the plaintiff's condition and work categories into which he could fit. Both a history and a standard test were used. In his opinion, plaintiff is now suited only for light or medium type work and cannot work as a longshoreman. Because of plaintiff's age, work experience, education, abilities, and condition, he has no real present earning capacity.

20. Plaintiff's projected yearly earnings are $27,701 plus 37% for the employer's contribution for fringe benefits. This is a total $37,950 earning capacity for 1987 and 1988. From the date of his injury to age 65, adjusted for mortality, plaintiff would have earned $142,650. Deducting for federal, state and local income taxes, the net is $124,534. Reduced by 3% to present value after taking productivity into account and relating

to the accident date, the present value of earnings and the employer's share of fringe benefits is $120,595. Although there is no formula for calculating an award for pain, suffering, discomfort, and inability to enjoy previous quality of life, we find the value of these things to be $60,000.

21. Dr. Stephen Weissman, a podiatrist, examined the plaintiff on January 5, 1989 and found the right ankle to be tender at several places and most tender at the outside of the ankle. He compared the right ankle with the left ankle and found that the range of motion in the right ankle is decreased. Dr. Weissman read the x-rays taken on December 30, 1986 and compared them with the x-rays taken February 10, 1987 and January 5, 1989. He stated that they show an arthritic condition which is progressing and growing worse. It is his opinion that plaintiff's injury on December 30, 1986 was the cause of this arthritic condition. The prognosis is not good and plaintiff cannot work as a longshoreman.

22. The accident on December 30, 1986 was the cause of plaintiff's present condition. Plaintiff's pre-existing condition resulted in the accident causing more harm than it would have caused in a person without such a pre-existing condition but the accident was nevertheless a legal cause of the condition and damages to plaintiff.

23. Plaintiff's total medical expenses are stipulated at $7,769.25.

24. The accident on December 30, 1986 was caused by the negligence of the shipowner.

DISCUSSION

The parties have stipulated in open court that there can be no claim of contributory negligence in this case. Upon reviewing the facts, we are compelled to find that the shipowner was negligent and that this negligence was the proximate cause of plaintiff's injuries.

The shipowner observed the cargo loading operations and had a direct part in them. It clearly actually knew of the condition of the deck cover when it was shut and the risk of harm to longshoremen it posed. It had warned the stevedoring company previously about the situation. Normally, this would be sufficient to preclude liability on its part. However, in the case at bar, officers of the ship knew from observing cargo unloading that the stevedoring company could not or would not correct the condition and the shipowner did nothing to correct or stop the stevedoring work. It clearly could have corrected this dangerous condition of the ship by installing metal plates or even walking boards over the slots in question, but it did nothing. It also could have stopped work until the area was marked in some way, but again, it did nothing. We do mean to imply in any way that a shipowner has a duty to supervise stevedoring operations, for it clearly does not. Nevertheless, when a shipowner actually knows of a shipboard condition which poses an unreasonable risk of harm to longshoremen and has reason to know that a mere warning to the stevedoring company is not sufficient to protect the longshoremen because the company cannot or will not correct the situation, a duty to intervene and correct the condition or stop work arises.[1]

With regard to damages, realistically speaking, the plaintiff could not do any work because of his age and condition. He is entitled to full damages for lost wages and benefits of $120,595. Although the expert's testimony is not binding on us, we are satisfied with his testimony. Plaintiff's medical expenses amount to $7,769.25, as per stipulation of counsel. The plaintiff, who has experienced pain, discomfort and a diminution in the quality of his life, is also entitled to the sum of

---

1. For an excellent discussion, *see* 3 Devitt, Blackmar, & Wolff, *Federal Jury Practice and Instructions-Civil* §95.27 (4th ed. 1987).

$60,000 for pain an suffering. Since this a maritime personal injury case, the plaintiff is also entitled to prejudgment interest.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this case pursuant to to 28 U.S.C.A. §1330(a) (West Supp. 1988).

2. The plaintiff has brought this action for personal injuries under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901-950 (West 1986 & Supp. 1988). 33 U.S.C.A §905(b) allows for a cause of action against the vessel based upon the vessel's negligence.

3. "[T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. [Citations omitted]." *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 159, 166-167, 101 S.Ct. 1615, 1622 (1981).

4. Although safety is a "matter of judgment committed to the stevedore in the first instance," *Id.* at 1626, there are limits to a vessel's reliance on the judgment of the stevedore. A vessel's duty to intervene and to correct the defective condition arises in the following circumstances: where the stevedore's judgment has been so

"obviously improvident" that the vessel should have realized, if it knew of the defective condition and of the stevedore's continuing to work with it, that the defective condition posed an unreasonable risk of harm to the longshoremen. *Id.*

5. "The shipowner is not relieved of liability as a matter of law simply because it relied on the stevedore to correct the condition, *Lieggi*, 667 F.2d at 328; *Evans*, 639 F.2d at 856-57, or because it relied on the stevedore's judgment to proceed with the work in spite of the condition, *Lieggi*, 667 F.2d at 328; *Lopez v. A/S Svendborg*, 581 F.2d 319, 324 (2d Cir. 1978). 'In such circumstances the question whether the owner's actions were negligent or not was for the jury to decide.' *Lieggi*, 667 F.2d at 328; see *Evans*, 639 F.2d at 856-57; *Napoli v. Hellenic Lines Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976)." *Moore v. M. P. Howlett, Inc.*, 704 F.2d 39, 42 (2d Cir. 1983). In the instant case, which is being tried without a jury, the court, as the finder of fact, must decide whether the vessel's reliance on the stevedore's judgment constituted negligence.

6. In the instant case, the vessel knew that the ladder rungs in the tween deck floor had been hidden by the thick paper laid down as a protection against moisture in the hold. Granted that this defect had been disclosed by the vessel to the stevedore. This warning, however, had been made at some indefinite time in the past and had been made to the stevedore and not to the longshoremen. The vessel chose to rely upon the judgment of the stevedore in protecting the safety of the longshoremen who were working in the tween deck.

7. Given the nature of the hazard involved, the stevedore's expectation that the longshoremen would remember past verbal warnings about the holes and, thus, avoid them, constituted poor judgment. Here were many sizeable holes, hidden by thick paper, in a busy workplace where men had to be constantly mindful of heavy loads of paper moving up and overhead out of the

hold. Actual neutralization of the hazard was necessary. To be sure, there is no duty on the part of the vessel to supervise the unloading of the vessel by the stevedore. *Scindia,* 101 S.Ct. at 1620 n.10. In the instant case, however, the officers of the vessel had occasion to observe the stevedore's unloading of the cargo. It, therefore, should have been obvious to them that the stevedore was continuing to work despite a hazard that was still hidden and that the stevedore would not or could not remedy that hazard. The vessel, from the inception of the voyage, knew that the ladder rungs were concealed by thick paper and knew, or should have known, that such a concealed condition posed an unreasonable risk of harm to the longshoremen working on board. That knowledge, plus awareness of the stevedore's improvident conduct, should have prompted the vessel to intervene and to take measures that would have prevented harm to the longshoremen from this hidden shipboard defect. Failing this, it should have instructed the stevedore to stop work. The vessel's failure to take such action constituted negligence.

8. Among the damages to which an injured plaintiff is entitled are the following: "past lost wages, reduced by the effective tax rate; his probable pecuniary loss over the duration of his career, reduced to its present value; past medical expenses; future estimated medical expenses, if any; past and future pain and suffering; and loss of life's pleasures." *Monaghan v. Uiterwky Lines, Ltd.,* 607 F.Supp. 1020, 1023 (E.D. Pa. 1985).

9. The computation of lost wages is made up of various elements, the most significant of which is the lost wage itself. There should also be included, however, those fringe benefits accorded the worker. *Jones v. Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 534 (1982).

10. The collateal source rule, whereby "a defendant is liable for the full extent of what the plaintiff's harm would have been in the absence of any benefits provided

by another source", *Collins v. Star Warrant Shipping Co.,* No. 85-5227, slip. op. at 3-4 (E.D. Pa. December 31, 1987) (Pollak, J.) would permit an injured longshoreman to recover, as part of his lost wages, the value of fringe benefits normally included as part of his compensation, even if those fringe benefits were financed by the employer and payments were made directly into a separate fund. *Id.* at 4-6.

11. Pre-judgment interest, in maritime personal injury cases, should be awarded, unless there are exceptional circumstances which would make such an award unjust. The rate of pre-judgment interest is within the discretion of the court. *Monaghan,* 607 F.Supp. at 1026. Even though the Pennsylvania courts have modified the rules pertaining to pre-judgment interest, we still find *Monaghan* authoritative.

12. Exceptional circumstances exist when the party requesting the interest has, (1) unreasonably delayed in prosecuting its claim, (2) made a bad faith estimate of its damages that precludes settlement, or (3) not sustained any actual damages. [Citations omitted]." *Matter of Banker's Trust Co.,* 658 F.2d 103, 108 (3d Cir. 1981), *cert. denied,* 456 U.S. 961 (1982). Since we find no such exceptional circumstances in the instant case, the plaintiff is entitled to pre-judgment interest.

13. A foreign state which is not entitled to immunity under the Foreign Sovereign Immunities Act, 28 U.S.C.A. §§1602-1611 "shall be liable in the same manner and to the same extent as a private individual under like circumstances; . . . ." 28 U.S.C.A. §1606. Pre-judgment interest has been awarded in a case brought under the Foreign Sovereign Immunities Act. *Felice Fedder Oriental Art, Inc. and Felice Fedder v. James S. Scanlon and The United Kingdon,* 1989 U.S. Dist. Lexis 2578 (S.D.N.Y.). Were the instant shipowner a private shipowner, it would be liable for pre-judgment interest in a maritime personal injury case. Had Congress intended to preclude pre-judgment interest, it

would have expressly said so as in the case of the United States under the Federal Tort Claims Act, 28 U.S.C.A. §2674 (West 1965).

14. Since the rate of pre-judgment interest is a matter within the discretion of the court, *Banker's Trust,* 658 F.2d at 112; *Monaghan,* 607 F.Supp. at 1026, we choose to apply a rate of interest of 9%.

15. In the instant case, the plaintiff's damages amount to the following:

Past and Future Lost Wages including Fringe Benefits and allowing for deduction of federal, state and local income taxes and reduced by 3% to present value	$120,595.00
Past Medical Expenses, as per stipulation of counsel	$ 7,769.25
Past and future pain and suffering	$ 60,000.00
Sub-Total	$188,364.25
Pre-judgment Interest at 9% from the date of the injury, December 30, 1986 on all past due amounts	$ 38,143.75
TOTAL	$226,508.00

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN CALLEN	:	CIVIL ACTION
	:	
v.	:	
	:	
OULU O/Y and OY FINNLINES, LTD.	:	No. 87-7830

VERDICT AND JUDGMENT

AND NOW, this 7th day of April, 1989, the court enters a verdict and judgment in favor of plaintiff, John Callen, and against defendants, OULU O/Y and OY Finnlines, Ltd., in the amount of $226,508.00.

BY THE COURT

Franklin S. Van Antwerpen, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1386

CALLEN, JOHN

v.

OULU O/Y and
OY FINNLINES, LTD.,

Appellants

Appeal from the United States District Court for the
Eastern District of Pennsylvania
(D.C. Civil Action No. 87-7830)
District Judge: Hon. Franklin S. Van Antwerpen

Argued: November 16, 1989

Before: HIGGINBOTHAM and SCIRICA, *Circuit Judges,*
and POLITAN, *District Judge.**

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

---

* Honorable Nicholas H. Politan, United States District Judge for the District of New Jersey sitting by designation.

Each party to bear their own costs.

BY THE COURT:

A. Leon Higginbotham, Jr.
Circuit Judge

Attest:

Sally Mrvos

Sally Mrvos, Clerk

January 29, 1990

Certified as a true copy and issued in lieu of a formal mandate on March 7, 1990

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1386

CALLEN, JOHN

v.

OULU O/Y and
OY FINNLINES, LTD.,

Appellants

(D.C. Civil Action No. 87-7830)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Becker would grant rehearing in banc.

BY THE COURT,

Chief Judge

Dated: February 27, 1990

A I don't know whether it was –
Q Did Mr. Callsen (phonetic) tell you, for instance?
A I don't know whether I talked to him or not. I really don't know who I talked to. There were a lotta guys on the corner. They – all the longshoremen hang on a corner.

And I said, what the hell did I tred in? And they said, hey, when that folds back, that becomes a ladder to get outta the hatch.

I had never seen that before. And I mighta worked that shift and looked at them and wondered what the hell they were. But I never asked anybody. I never saw them.
Q Okay. Did the longshoremen tell you in the hold, after you had injured your foot, did you then ask somebody – that day, did you ask somebody what the hole was?
A No, I didn't – I wanted to get – I tried to get my foot workin'. And I was in a lotta pain and I told Beetle, I said, boy, I think I broke this. I swore I broke my foot. I thought it was broke.

THE COURT: Well, when was the first somebody told you about those steps and what they'd become, before or after the accident?

THE WITNESS: After. After, Your Honor.

THE COURT: Nobody said anything before it?

THE WITNESS: No.

THE COURT: Okay. Proceed.

A Um hmm.
Q Is that right?
A Yes
Q Okay. Am I correct that these notches also appear on the other Finn ships, the Finn Arctic, Finn Oceanus and the Varjakka?
A Yes.
Q Now, those four ships call regularly at Independent Pier Company, am I right?
A Yes.
Q And they –

MR. SOVEL: Objection, Your Honor. I think it's too leading at this point.

THE COURT: Very well.

BY MR. BERRY:
Q How often do the – those ships call at Independent Pier?
A I guess, in a cycle, about a month. Once a month. Somethin' like that.
Q Are each of those ships in once a month?
A Around that, yeah.
Q And can you describe how the cargo was stowed on the tween decks of those vessels when it arrives in port?
A Well, right now, I really don't – what hatch am I talkin' about right now?

Q Okay.

THE COURT: Do you have any idea at all how many times it's been in? If you don't, tell me.

THE WITNESS: No, I don't.

THE COURT: You really don't.

THE WITNESS: No.

THE COURT: Okay.

BY MR. BERRY:

Q Am I correct, these ships have been bringing paper into Philadelphia to Independent Pier Company – well, strike that. Let me ask the question.

How many years have these ships been coming into Independent Pier to discharge paper products, as far as you know?

A Maybe 15 years, 20 years. I don't know.

Q And let me restrict the question. From 1982 to 1986 you had – had you worked at Independent Pier discharging paper products from these ships?

A Yes.

Q And you were – were you a regular gang boss and was your gang regularly employed during those four years discharging paper from these ships?

A Yes.

Q And would that include paper from the number three hatch?

A Yes. And the rotate.
Q Pardon me?
A They rotate. They rotate the gangs. One, two three. Back again, one, two, three. Yes.
Q So you would have discharged from the number one hatch, number two hatch and number three hatch?
A Right.
Q Were you aware before December 30, 1986 that the notches were present in the tween deck covers?
A Yes, I were aware.
Q Okay. Were the longshoremen – did you instruct the longshoremen in your gang about the presence of the notches in the tween deck cover?
A Yes.
Q Pardon me?
A Not that day. Yes.
Q Not December 30, 1986.
A Right.
Q Prior to that –
A 'Cause they work – the men work it.
Q Pardon me?
A The men that have employed for me, they work it, in my gang.
Q Well, tell us how the men in your gang know the presence of those notches are – know that the notches are present in the hatch –

MR. SOVEL: Objection, Your Honor.

I don't know how this – as phrased, I don't know that there's any foundation for the question –

MR. BERRY: Okay.

MR. SOVEL: – as to how they – he would know how they know.

MR. BERRY: All right. Let – I withdraw the question, Your Honor.

BY MR. BERRY:

Q At some point prior to December 30, 1986, did you instruct your – the men that work in your gang with respect to the presence of the notches?

A Yes.

Q Okay. The men who work in your gang, do they work on a regular basis?

A Yes.

Q Now, do you hire replacements for your gang when the regular members of your gang cannot work?

A Yes.

Q And they're called pick ups?

A Yes.

Q The regular members of your gang from 1982 to '86, would they have worked, at your direction, on the ships in question at Independent Pier discharging paper products?

MR. SOVEL: Objection, Your Honor. Again, it's all leading questions I think.

THE COURT: They are. The objection is sustained.

BY MR. BERRY:

Q Well, do you recall specifically instructing the regular members of your gang regarding the presence of these notches and the fact that they were covered with paper?

A I don't know how long ago, but I told 'em.

Q Did you give any – strike that.

Was Mr. Callen a pick up in your gang on December 30, 1986?

A Yes.

Q Did he work regularly in your gang?

A No.

Q Did he work occasionally in your gang?

A Yes.

Q On the occasions that he had worked in your gang, do you know if he were discharging paper products from the Finnish ships that we're – we've mentioned before?

A Gee, I don't know. I couldn't tell you.

Q Did you give him any special instruction on December 30, 1986 with respect to the notches and the fact that they were covered with paper and paper rolls?

A No.

Q Did you give any special instructions to any of the

people who were not regulars in your gang regarding the presence of the notches and the fact that they were covered with paper and paper cargo when discharging cargo from these Finnish ships that we've referenced?
A No.
Q How is it that you believed that they would become aware, these people that are not regular members of your gang, how is it that you believe they would become aware of the notches in the hatch lids that we're talking about?

MR. SOVEL: Objection, Your Honor.

THE COURT: I think as to his belief, it has some relevance. I'll permit it.

THE WITNESS: I figured the men would tell 'em. My men that work steady with me.
BY MR. BERRY:
Q Well, how is it that the men that work – how is it that you believe that the men who work steady for you would know the notches were there?
A Rephrase that question again.
Q You presume that the men who worked for you would tell Mr. Callen about the presence of the notches, right?
A Yes.
Q How would they know to tell Mr. Callen?
A I don't know.
Q Am I correct – strike that.

BY MR. BERRY:

Q Do you have to remove the paper from the number three 'tween deck prior to opening the 'tween deck covers?

A Yes.

Q Was the done in December of 1986?

MR. SOVEL: Objection.

THE WITNESS: Yes.

BY MR. BERRY:

Q Is there – when the paper covers these ladders on the 'tween deck of number three on the Pokkinen, can you tell if the ladder is there by looking at the paper?

MS. SCHERER: The cargo on top of the paper causes impressions in the place of the ladder, so that they are visible.

BY MR. BERRY:

Q In December 30, 1986, did you receive any complaints from the longshoremen or stevedores working on board the Pokkinen regarding the condition of the cargo or discharge operations?

MR. SOVEL: Objection. Are you asking for basis:

MR. BERRY: Yes.

MR. SOVEL: Irrelevant.
BY MR. BERRY:
Q. Did you receive any complaints from the longshoremen or the stevedores regarding discharge operations?
A. No.
Q. Did you receive any notice of an injury to a longshoreman on December 30, 1986, on board the Pokkinen?
A. No.
Q Was there any notation in the vessel's log book regarding an injury to a longshoreman on December 30, 1986?
A. No.
Q About how far – could you hold up defendant's exhibit number 13 for the camera so the jury can see the ladder we're talking about. (Witness complies). About how far from the side of the ship is that ladder?
A. About two, two and a half meters.
Q And is that depicted on defendant's exhibit 10?
A. Yes.
Q. How much – how high is it from the 'tween

89-1868

No. 90 - 1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

John Callen,

Respondent,

v.

OULO O/Y and OY Finnlines, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

AND SUPPLEMENTAL APPENDIX

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90 - 1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

John Callen,

Respondent,

v.

OULO O/Y and OY Finnlines, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, John Callen, respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the within case for the following reasons:

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania is officially reported at 711 F. Supp. 244 (E.D. Pa. 1989). The judgment of the United States Court of Appeals for the Third Circuit affirming the lower court decision is officially reported at 897 F.2d 520 (3rd Cir. 1990). The remaining references to the opinions below in the petition are correct.

STATEMENT OF THE CASE

Respondent, a longshoreman who was discharging cargo from petitioners' ship, was injured when he stepped into what was, in effect, a concealed hole in the ship's 'tween deck. The trial judge, sitting as the trier of fact in a non-jury trial, concluded (1) that the presence of concealed holes in a busy workplace constituted a hazardous condition, (2) that reliance on warnings to the longshoremen of the presence of these concealed holes to protect them from injury "constituted poor judgment," and (3) that reasonable care under the circumstances mandated that "[A]ctual neutralization of the hazard (created by the concealed holes) was necessary" (Conclusion of Law No. 7 (9a-10a)).

The hole into which respondent stepped actually was a rung of a ladder which was built into the ship's 'tween deck.[1] The design of the ship's 'tween deck was such that, when the 'tween deck was opened to permit access to the lower hold, the entire 'tween deck folded to an upright position, much like the effect of squeezing an accordion. Half the 'tween deck folded forward against the forward bulkhead of the hold and half folded backward against the after bulkhead. When this was done, the

---

1. Each hold of the ship had two deck levels, a 'tween (or between) deck and a lower hold. As described in the text, each 'tween deck folded open to permit access to the lower hold.

open, and now upright, sections of the 'tween deck blocked the escape hatch ladders located on the forward and after bulkheads of the hold. As a result, it was necessary to provide additional ladders which would be accessible when the 'tween deck was opened, and this was accomplished by building ladder rungs into a portion of the 'tween deck which, when the 'tween deck was opened, would coincide with the escape hatch ladders which were blocked (See Finding of Fact No. 5 (2a)).

These ladder rungs were 40 cm. long (approximately 16 inches), 10 cm. wide (approximately 4 inches) and 10 cm. deep (Finding of Fact No. 6 (2a)). Sixteen of these rungs were built into the 'tween deck next to each other but spaced so that, when the deck was open and in an upright position, they formed a ladder. However, when the 'tween deck was closed and in the horizontal position, these "rungs" were simply holes in the deck.[2]

The holes forming the ladder rungs were recessed from the rest of the 'tween deck thereby permitting a flush cover or plate to be placed over them when the 'tween deck was closed. There was evidence that such covers or plates had been used on prior occasions (See Finding of Fact No. 6 (2a-3a)). However, no such covers or plates were in use at the time respondent was injured. Had they been used there would have been no hole in the deck for respondent to step into.

At the time of the accident, the longshoremen were discharging a cargo of rolls of paper. These rolls of paper had been loaded in Finnland. At the time the rolls of paper were loaded, a heavy cardboard-like paper was put down on the 'tween deck to protect the cargo from dirt and moisture on the deck. This cardboard-like paper covered the ladder rung holes, conceal-

---

2. Counsel for petitioners, in an excess of poetic license, refers to these holes as "notches". In no sense were they notches. The trial judge found them to be "holes" (Finding of Fact No. 6 (2a)), and their measurements show they were both large enough and deep enough to permit a man's foot to sink into them.

ing them from view (Findings of Fact Nos. 9 and 10 (3a)). The ship's officers observed both the loading and unloading of the cargo and knew the ladder rung holes were concealed by the cardboard-like paper that had been put down on the 'tween deck (Findings of Fact Nos. 8 and 10 (3a), Conclusion of Law No. 6 (9a)).

The method of discharge used by the discharging longshoremen involved the use of a device know as a Jensen rig. A Jensen rig is a cage-like device which is lowered over several rolls of paper by the ship's crane and closed by pulling four lanyards (Finding of Fact No. 4 (2a)). The method of discharge also involved the use of a fork lift truck equipped with a paper clamp which would pick up the rolls of paper and move them into position where they could be picked up by the Jensen rig.

Respondent was working in the ship's hold. His job was to help guide the Jensen rig into position over the rolls of paper as it was lowered into the hold, and then to assist in tightening the lanyards (Finding of Fact No. 4 (2a)). In this operation respondent had to look upwards at the Jensen rig as it was being lowered into position over the rolls of paper while, at the same time, keeping an eye out for the fork lift truck which was constantly moving about him. Respondent was injured in the course of this operation when, while stepping backward while tightening a lanyard, his right foot went through the paper on the deck into one of the concealed ladder rung holes, causing him to fall and suffer the injuries for which this suit was brought (Finding of Fact No. 12 (4a)).

Respondent's foreman, a Joseph Micofsky, was aware of the ladder rung holes from having previously worked on the ship. When asked what he did on those prior occasions to protect his men from injury from stepping into these holes, Micofsky testified that he simply told his men to watch out for the holes. However, even with this warning, the men still tripped over the holes (2b-3b). On the day of the accident, respondent was a "pick-up" in the Micofsky gang, and never having worked on the ship before, was neither warned nor was aware of the concealed

ladder rung holes (Finding of Fact No. 6 (3a)).

On the basis of the foregoing evidence, the trial judge found that, since the concealed ladder rung holes were located in "a busy workplace", giving warning of their presence was not an adequate measure to protect the longshoremen from injury; instead, "actual neutralization" of this hazard was necessary, and the vessel, which knew of the condition, and knew that the stevedore was not taking measures to protect the longshoremen from this "hidden shipboard defect", had a duty to intervene and require that appropriate protective measures be taken (Conclusion of Law No. 7 (9a-10a)). The trial judge concluded that "[T]he vessel's failure to take such action constituted negligence" (Conclusion of Law No. 7 (10a)).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Question Presented in the petition.

The petition is predicated on a misstatement of the decision below. The trial judge did *not* find that the vessel was negligent because of any failure to give warning of the concealed ladder rung holes to the individual longshoremen, nor did the trial judge base his finding of negligence on the vessel's failure to intervene in the stevedoring operations in order to give such a warning. Rather, the trial judge found that simply giving warning of the presence of the concealed holes in the deck was not an adequate measure to protect the longshoremen from injury, and that, instead, "actual neutralization" of this hazard was necessary (10a). The vessel's negligence was not the failure to give warning of the hazard, but, rather, the failure to intervene in the stevedoring operations in order to require the "actual neutralization" of the hazardous condition. Thus, the trial judge concluded (Conclusion of Law No. 7 (10a)):

> . . . The vessel, from the inception of the voyage, knew that the ladder rungs were concealed by thick

> paper and knew, or should have known, that such a concealed condition posed an unreasonable risk of harm to the longshoremen working on board. *That knowledge, plus awareness of the stevedore's improvident conduct, should have prompted the vessel to intervene and to take measures that would have prevented harm to the longshoremen from this hidden shipboard defect.* Failing this, it should have instructed the stevedore to stop work. *The vessel's failure to take such action constituted negligence.* (Emphasis supplied)

The petition also misstates this Court's holding in *Scindia Steam Navigation Co., Ltd.*, 451 U.S. 156 (1981). The petition cites *Scindia* as standing for the proposition that the vessel's duty of care is limited to simply giving warning to the stevedore of unsafe conditions of which the vessel knows or has reason to know (see petition at pp.8-9). This is not a correct statement of this Court's holding in *Scindia*.

In *Scindia*, the shipowner *argued* that its duty of care should be limited to merely giving warning of an unsafe condition to the longshoreman's stevedore employer, see 451 U.S. at 172-173. This Court rejected this limitation,[3] and instead held that a shipowner would have a duty to intervene in stevedoring operations if it knew that the stevedore was acting improvidently in continuing to use ship's equipment which was in an unsafe condition. Thus, this Court stated in *Scindia*, 451 U.S. at 175-176:

---

3. The excerpt from the *Scindia* decision quoted at pages 8-9 of the petition is *not* a statement of the Court's holding, but rather a statement of what the shipowner in *Scindia* "conceded" the shipowner's duty of care to be. This Court, in Section IV of the *Scindia* opinion, subequently rejected the contention that a shipowner's duty of care was limited to simply giving warning of an unsafe condition, and instead held that a shipowner would have a duty to intervene in stevedoring operations if the circumstances were such that the shipowner knew or had reason to know that the stevedore was acting "improvidently" in failing to remedy an unsafe condition, see *Scindia*, 451 U.S. at 175-176.

> Yet it is quite possible, it seems to us, that Seattle's (the stevedore) judgment in the respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

The instant case involved a hazardous condition of the vessel's deck of which the shipowner had *actual* knowledge. The shipowner also had *actual* knowledge that the stevedore was not taking action to remedy this hazardous condition. The trial judge found that the nature of the hazardous condition was such that simply warning of the unsafe condition was not sufficient, and that "actual neutralization" of the hazard was necessary (Conclusion of Law No. 7 (9a-10a)). This finding was amply supported by the evidence and in no sense could it be considered to be "clearly erroneous."[4] Since the trial judge's finding of negligence was not predicated on a failure to give warning, the issue raised by the Question Presented in the petition and the arguments made in the petition simply are not presented by the decision below or by the record in this case. Accordingly, for this reason alone, the petition should be denied.

In addition, the trial judge properly applied the principles set forth in the *Scindia* decision, and his findings of fact do not raise any issues which go beyond the facts of this particular case, or present any issues of importance which would warrant further review by this Court.

---

4. There is no contention by petitioner that any of the trial judge's findings are not supported by the evidence or are "clearly erroneous."

2. The decision below is not in conflict with the Ninth Circuit's decision in *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1989 A.M.C. 381 (9th Cir. 1988).

Petitioners' citation of *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1989 A.M.C. 381 (9th Cir. 1988), as being in conflict with the decision below is without merit. The *Bjaranson* decision is factually distinguishable from the instant case, and was decided on an entirely different legal basis.

Bjaranson involved an injury to a longshoreman caused by a fall from a ladder. The longshoreman's claim of negligence was that the ladder was unsafe because it lacked adequate hand holds. The Ninth Circuit held that the danger created by the absence of the hand holds easily could have been avoided by the longshoremen, and, therefore, the evidence did not establish the existence of a condition which created an *unreasonable* risk of harm to longshoremen, see 873 F.2d at 1208. On this basis, the Ninth Circuit reversed the trial court, and granted judgment n.o.v. in favor of the shipowner. The decision in *Bjaranson* then went on to note, in what clearly was *dicta*, that the condition of the ladder was open and obvious and that "the fact that the condition was obvious to his (the longshoreman's) employer eliminated *whatever* duty there may have been upon Botelho to warn the individual employees", see 873 F.2d at 1209 (Emphasis supplied).

The Ninth Circuit's decision in *Bjaranson* does not hold that the shipowner's duty is limited to the giving of warning to the stevedore of a hazardous condition, nor does it hold that *in all cases* the duty to warn is fulfilled simply by giving warning to the longshoreman's stevedore employer. Rather, the Ninth Circuit simply stated that in those circumstances where a hazardous condition is open and obvious to the employer, there is no need to give a seperate warning of the hazard to the individual longshoremen.

In the instant case, the hazardous condition created by the concealed ladder rung holes was *not* open and obvious. More

importantly, the trial judge in the instant case found that simply giving warning of the hazard was *not* sufficient to protect the longshoremen from injury, and that "actual neutralization" of this hazard was necessary (Conclusion of Law No. 7 (9a-10a)). Consequently, the issue raised in *Bjaranson* as to whether it is necessary to give warning of a hazard to the individual longshoremen, as distinguished from just giving warning to their stevedore employer, is not involved in the instant case. Accordingly, there is nothing in the *Bjaranson* decision which is in conflict with the decision in the instant case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Sts.
Philadelphia, PA 19106
(215) 925 - 8400
Attorneys for Respondent

SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix - 138a

MR. BERRY: That's all I have. Thank you.

CROSS EXAMINATION

BY MR. SOVEL:

Q Mr. Micofsky, in the years that these ships have been coming in, did you ever observe the existence of covers that went over those ladder rungs in the holds?

A Yes.

Q Would you tell - - what about them?

A There - - they were - - I guess, they look like aluminum plate, maybe four or five pieces that covered the ladder - -

MR. BERRY: Your Honor - -

THE WITNESS: And when we're done discharging - -

MR. BERRY: Your Honor - -

THE WITNESS: When we're done discharging - -

MR. SOVEL: Hold it.

MR. BERRY: Your Honor, I'd like to object that its beyond the scope of direct.

THE COURT: Objection's overruled.

BY MR. SOVEL:

Q When would you observe the covers and how would you observe them?

Q See when the ship - - the hatch was done, the four or five plate - - the crew used to come down and unscrew 'em and take 'em and put 'em somewhere.

Excerpt from Court of Appeals Appendix - 139a

Micofsky, J. - cross/Sovel

Q And then, did that stop?
A Yes, it did stop.
Q Now, after they stopped having those covers on it, did you still have situations where men tripped over the rungs?
A Yes.
Q Even though they knew about them?
A Yes.

MR. SOVEL: Thank you.

REDIRECT EXAMINATION

BY MR. BERRY:
Q Mr. Micofsky, am I correct, it's been about 10 or 15 years since those covers have been there?
A Well, I don't know how long the ships been comin' into the port.
Q It's bee about 10 or 15 years since you've seen those covers on top of the ladders?
A It's a Finnline. I don't know how long them ships been comin' in.
Q My question isn't how - - Mr. Micofsky, my question is not how long the ships been coming in. The question is when is the last time you saw a cover on one of those ladders? And it's been about 10 to 15 years, is that a fair statement?
A Yeah, it's been a long time.
Q Pardon me?

Excerpt from Court of Appeals Appendix - 140a

Micofsky, J. - redirect/Berry

A It's been a long time.
Q Approximately ten years?
A Guess so. I don't know.
Q Okay. And in the - - in the last five years before December 30, 1986, you've never seen a cover on those ladders, is - - am I right?
A No.
Q My - - the way I phrased that question, your answer's not clear.
It is correct that you've never seen a cover in the last five years on those ladders, correct?
A No, I never seen a cover on the ladders?
Q Okay. And I'm not clear on Mr. Sovel's last answer. But men have tripped on these covers in the last five or six years?
A Yes.
Q So that you knew that men were tripping on the ladders.
A Yes.
Q Correct?
A Yes.
Q And what effort did you make to tell the longshoremen in your gang to watch out for the ladders that were there?
A They watch out, that's all. Don't slip. Don't fall in the holes.
Q And you told that to your regular members at some point

(4)

No. 89-1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent,

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

REPLY BRIEF

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners,
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

No. 89-1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent,

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

REPLY BRIEF

Respondent's Brief simply does not address the error of the lower court's holding. The lower court erred in holding that the shipowner did not discharge its duty to the plaintiff-longshoreman by notifying plaintiff's employer, the stevedore, of the "hidden defect"; rather, the lower court held that the shipowner had a continuing duty to supervise the stevedore's operation to ensure that there was "actual neutralization" of the alleged hazard. (10a). It is this holding of the lower court, i.e., requiring the shipowner to supervise the conduct of the stevedore, that is in direct conflict with This Court's decision in *Scindia* and the Ninth Circuit's decision in *Bjaranson*.

Petitioners admitted in their Petition that the shipowner has a duty to intervene in the stevedore's operation when: (1) the stevedore is proceeding in an obviously improvident manner; and (2) the shipowner knew that the stevedore was proceeding in such an obviously improvident manner. (See page 12 of Petitioners' Brief.) However, the duty to intervene is not applicable to the instant case because there was no evidence that the crew had knowledge that the stevedore was proceeding in an improvident manner. By imposing liability in this case, where there was no evidence that the shipowner had any knowledge that the stevedore was proceeding improvidently, the lower court has imposed a duty on the shipowner to oversee the stevedore's operation for any "obviously improvident" conduct. This Court rejected any such duty in *Scindia*.

Likewise, Petitioners never claimed that the ladder built into the tween deck was an open and obvious condition: the ladder had admittedly been covered with brown paper by the loading stevedore. However, once the lower court found that the shipowner had met its initial duty of warning the stevedore of the presence of the ladder under the paper (7a), and it was undisputed that this warning had proved adequate as far as the shipowner knew for the preceding 10-15 years, it was error for the lower court to impose any further duty on the shipowner without evidence that the shipowner had actual knowledge that the stevedore was proceeding in an "obviously improvident" manner. The lower court made no such finding of actual knowledge.

Under the lower court's holding, and Respondent's interpretation of the law, the shipowner in *Scindia* would have been held liable simply because of the existence of a defective winch, even if it had no actual knowledge that the longshoremen were continuing to use the malfunctioning winch and that use of the malfunctioning winch was obviously improvident. The mere existence of the defect, even if the shipowner had

warned the stevedore, would have been sufficient to impose liability under the lower court's holding in the instant case.

Also, under the holding of the lower court, and Respondent's interpretation of the law, the shipowner would have been liable in *Bjaranson* simply because it knew that the coaming ladder lacked adequate hand rails; the fact that the shipowner warned the stevedore of this fact would not have been sufficient to discharge its duty of "actual neutralization" of the alleged hazard. Such a duty is clearly contrary to the Ninth Circuit's holding in *Bjaranson*, as well as This Court's holding in *Scindia*.

As a final note, Petitioners suggest that footnote 3 of Respondent's Brief is in error. Petitioners believe the excerpt from the *Scindia* decision quoted at pages 8-9 of Petitioners' Brief is indeed the Supreme Court's holding with regard to the shipowner's duty prior to turning the vessel over to the stevedore; it is not a statement of "what the shipowner in *Scindia* 'conceded' the shipowner's duty of care to be", as Respondent asserts. If Petitioners' interpretation of this excerpt in *Scindia* is correct, then it is readily apparent that the holding of the lower court in this case, requiring the shipowner to not only warn of hidden dangers but also to "neutralize" those conditions for the stevedore, is in direct conflict with the Supreme Court's statement of the law in *Scindia*.

Respectfully submitted,

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners,
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000